

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

No. 2:20-cv-0526 KJM DB

Plaintiff,

v.

KIM EMBRY AND ENVIRONMENTAL
HEALTH ADVOCATES, INC.,

ORDER

Defendants.

This matter came before the undersigned on February 9, 2024, for hearing of plaintiff's motions to compel pursuant to Local Rule 302(c)(1). (ECF No. 158.) Attorneys Matthew Borden and Chelsea Tirgardoon appeared on behalf of plaintiff. Attorney Jeff Neer appeared on behalf of defendants. Oral argument was heard, and plaintiff's motions were taken under submission. For the reasons explained below, and at the February 9, 2024 hearing, plaintiff's motions will be granted in part and denied in part.

I. Plaintiff's Motion to Compel Discovery Related to Defendants' Sham Litigation

Plaintiffs are proceeding on a second amended complaint filed on November 23, 2022. (ECF No. 57.) The second amended complaint alleges that plaintiff sells and distributes cookies under the Snackwell brand around the nation. (Id. at 4.¹) Defendants Kim Embry and

¹ Page number citations such as this one are to the page number reflected on the court's CM/ECF

1 Environmental Health Advocates (“EHA”) allegedly engaged in sham litigation by suing plaintiff
2 pursuant to California Proposition 65. (Id. at 1-5.)

3 In the parties’ Joint Statement plaintiff addresses two categories of discovery requests: (1)
4 “Materials Related to B&G Food’s Allegation that Defendants Orchestrated Sham Prop 65
5 Litigation” which consists of “RFP No. 17-23, 25” (JS (ECF No. 146) at 8-18); (2) and
6 “Materials Related to the Public Interest” which consists of “RFP No. 16, Topic Nos, 11–15, 17,
7 21–22, 24.” (Id. at 18-23). Contained within these two categories are 18 unique discovery
8 requests, which defendants have asserted are vague, ambiguous, and overbroad. Review of the
9 discovery requests finds defendants’ argument well-taken.

10 For example, plaintiff’s discovery requests seek “ALL DOCUMENTS RELATING TO
11 YOUR relationship with [defendant] Kim Embry[.]” (Id. at 11.) What qualifies as a document
12 relating to a relationship is unclear. Nor is it clear why all such documents would be relevant.
13 “All DOCUMENTS RELATING TO YOUR relationship with YOUR legal representation[.]”
14 (Id. at 12.) Putting aside the obvious implications of privilege, again what qualifies as a
15 document relating to a relationship and their relevance is unclear.

16 “All DOCUMENTS RELATING TO YOUR representation that YOU file
17 PROPOSITION 65 cases . . for the benefit of the public.” (Id. at 18.) Aside from the complaint
18 in a lawsuit, it is entirely unclear what would constitute a document relating to a representation
19 one files lawsuits for the benefit of the public. Plaintiff’s deposition Topic No. 24 seeks to
20 discuss “Any and all work that YOU represent to be to better (sic) environment that YOU
21 conducted June 2019, through present[.]” (Id. at 20.) The precise meaning of this topic is entirely
22 unclear.

23 It is possible that plaintiff could articulate how a specific discovery request is not vague,
24 ambiguous, or overbroad. However, rather than addressing each individual request with
25 argument and analysis in support of why defendants’ objections are without merit, plaintiff has
26 simply provided global and general arguments. From this vague and conclusory briefing, the
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1 undersigned cannot find that plaintiff's motion should be granted.² See generally Valenzuela v.
2 City of Calexico, No. 14-cv-481 BAS PCL, 2015 WL 926149, at *1 (S.D. Cal. Mar. 4, 2015)
3 ("the moving party carries the burden of informing the court: (1) which discovery requests are the
4 subject of his motion to compel; (2) which of the defendants' responses are disputed; (3) why the
5 responses are deficient; (4) the reasons defendants' objections are without merit; and (5) the
6 relevance of the requested information to the prosecution of his action"); Soto v. City of Concord,
7 162 F.R.D. 603, 610 (N.D. Cal. 1995) ("the party seeking to compel discovery bears the burden
8 of showing that his request satisfies the relevance requirement of Rule 26").

9 Presented with this briefing alone the undersigned would have denied plaintiff's motion to
10 compel in its entirety. However, in the Joint Statement defendants acknowledge having offered
11 plaintiff "multiple reasonable compromises" including "to produce all non-privileged, pre-suit
12 investigative documents for a random sampling of . . .70" Violation of Proposition 65 ("NOV")
13 actions defendants have initiated. (JS (ECF No. 146) at 4.) Because, as defendants acknowledge,
14 if presented with a motion to compel based on adequate briefing plaintiff "may be permitted some
15 leeway to vet its" claims, the undersigned will order defendants to produce documents consistent
16 with the offered compromise.³ Defendants, therefore, will be ordered to produce a random
17 sampling of 70 NOVs.

18 **II. Plaintiff's Motion to Compel Discovery Related to Defendants' Investigation**

19 As with the motion addresses above, plaintiff has taken multiple distinct discovery items
20 and combined them into just three groups. Before addressing those three groups of discovery
21 below, the undersigned will note that while there are circumstances in which such briefing is
22 permissible, even preferable, this is not one of them. The discovery items and arguments are
23 sufficiently unique such that plaintiff should have addressed each individual request at issue
24 separately. Or at a minimum grouped the discovery items into smaller groups for which the same
25 argument and analysis could apply.

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28 ² This is not the first-time plaintiff's briefing has been insufficient. See ECF No. 136 at 2.

³ The undersigned would encourage the parties to continue to seek compromise.

1 **1. Materials Related to Defendants' Failure to Investigate Affirmative Defenses**

2 At issue here are RFP Nos. 14-15 and Deposition Topic No. 5 (JS (ECF No. 152) at 8-12).
3 Defendants have objected to this discovery as vague, ambiguous, and overbroad. And
4 defendants' argument is well-taken. In this regard, plaintiff seeks "all DOCUMENTS
5 RELATING TO YOUR representation that the State of California knows ACRYLAMIDE causes
6 cancer." (Id. at 8.) Plaintiff also seeks "All DOCUMENTS RELATING TO YOUR knowledge
7 that ACRYLAMIDE causes cancer[.]" (Id.) What constitutes a document relating to a
8 representation or knowledge is unclear.

9 As to deposition Topic No. 5, plaintiff seeks a deposition as to "YOUR representations
10 RELATED TO ACRYLAMIDE causing cancer[.]"⁴ (Id. at 9.) Defendants state:

11 Cal. Health & Safety Code § 25249.8 governs the listing of chemicals
12 under Proposition 65. This section requires the Governor to publish
13 annually "a list of those chemicals known to the state to cause cancer
14 or reproductive toxicity[.]" Acrylamide was listed as a carcinogen
15 in 1990 and a reproductive toxin in 2011. Cal. Code Regs. tit. 27, §
16 27001(b) and (c). It is entirely reasonable — if not expected — of a
17 private enforcer to rely on the State's list of implicated chemicals,
18 which have been carefully researched and curated. Further, having
19 conducted pre-suit investigations in the underlying state court
20 actions, which indicated acrylamide was present in the subject cookie
21 products at detectable levels proscribed under the Act, Defendants
22 could rely in good faith that clear and reasonable warnings on B&G's
23 cookie products were required.

24 (Id. at 12.)

25 While this may be true, if plaintiff wishes to depose defendants' designated witness as to
26 Acrylamide and cancer, that would be relevant and not vague, ambiguous, or overbroad.
27 Plaintiff's motion, therefore, will be granted as to this request.

28 **2. Materials Identifying Who Assisted Defendants in Bringing Their Claims**

29 At issue here are Interrogatory No. 5, Deposition Topic No. 18 and Topic No. 20 (JS
30 (ECF No. 152) at 13-18.) Defendants have also objected to these discovery requests as vague,
31 ambiguous, and overbroad. Again, defendants' argument is well-taken. For example, plaintiff

26 ⁴ As noted by defendants Acrylamide was listed in 1990 as a carcinogen pursuant to California's
27 Proposition 65. See generally
28 https://www.p65warnings.ca.gov/sites/default/files/downloads/factsheets/acrylamide_fact_sheet.pdf

1 asks defendants to “DESCRIBE all individual PERSONS . . . YOU contacted REGARDING
2 YOUR COMPLAINT,” and to identify “YOUR relationship . . . YOUR dates of
3 COMMUNICATION . . . the number of times YOU have consulted with that consultant, the
4 amount YOU paid them,” as well as “the services for which YOU have paid them[.]” (Id. at 13.)
5 A complete answer to this interrogatory might include associate attorneys, office staff, court
6 personnel, letter carriers, etc., and require defendants to list entirely unrelated “services for which
7 [defendants] have paid them.” (Id.)

8 Plaintiff’s deposition Topic No. 20 seeks a deposition on defendants’ “legal
9 representation” including “DOCUMENTS RELATING TO YOUR relationship with Noam
10 Glick, Nocholas & Tomasevic, LLP, Glick Law Group, P.C., Entorno Law, LLP.” (Id. at 14.)
11 Again, the all-inclusive phrase “documents relating to a relationship” makes the request vague,
12 ambiguous, and overbroad.

13 **3. Defendants as Custodians**

14 Plaintiff’s discussion of this issue is especially vague, conclusory, and truncated. Plaintiff
15 asserts that “Defendants have agreed only to name their attorneys as custodians.” (JS (ECF No.
16 152) at 18.) Plaintiff argues that defendants “should name themselves as custodians, conduct the
17 searches, and disclose their lack of ESI.” (Id.)

18 Plaintiff cites Thomas v. City of New York, 336 F.R.D. 1, 4 (E.D. N.Y. 2020) for the
19 proposition that it rejects “redundancy and burden argument for refusing to name defendants as
20 custodians.” (JS (ECF No. 152) at 18.) But the court in Thomas was dealing with a proposal “of
21 splicing” together ESI production from different parties in the name of avoiding redundancy and
22 burden. Thomas, 336 F.R.D. at 4 (“This kind of splicing—collecting emails from one defendant,
23 text messages from another—with the hope that the amalgam of information is the universe of
24 relevant discovery is an inappropriate collection and production methodology. It assumes that
25 one person’s documents are complete and nothing has been deleted or expunged, that reviewing
26 duplicate information is unduly burdensome or disproportionate, and that custodian information is
27 irrelevant.”). Here, defendants have explicitly stated that “neither Ms. Embry nor Mr. Duran
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1 (EHA's principal) possess ESI," and note that plaintiff "can ask Ms. Embry and Mr. Duran at
2 their depositions" about "their futile efforts to locate ESI." (JS (ECF No. 152) at 18.)

3 "Relatively little legal authority exists on the standards a court should apply when parties
4 are unable to agree on designated ESI custodians and a party seeks to compel another party to
5 designate an additional ESI custodian or custodians." In re EpiPen (Epinephrine Injection, USP)
6 Marketing, Sales Practices and Antitrust Litigation, Case No. 17-md-2785 DDC TJJ, 2018 WL
7 1440923, at *2 (D. Kan. Mar. 15, 2018). However, "the party who will be responding to
8 discovery requests is entitled to select the custodians it deems most likely to possess responsive
9 information and to search the files of those individuals." Id. "Good cause to compel designation
10 of additional document custodians generally requires a showing that the disputed custodians
11 possess uniquely relevant information that is not available from the sources already designated."
12 In re Facebook, Inc. Consumer Privacy User Profile Litigation, JAMS REF. NO: 1200058674,
13 2021 WL 10282213, at *14 (N.D. Cal. Nov. 14, 2021).

14 Here, plaintiff has made no showing that the defendants possess uniquely relevant
15 information. Plaintiff's motion will, therefore, be denied as to this issue.

16 CONCLUSION

17 Accordingly, for the reasons stated above and at the February 9, 2024 hearing, IT IS
18 HEREBY ORDERED that:

19 1. Plaintiff's January 5, 2024 motion to compel (ECF No. 137) is granted in part and
20 denied in part;

21 2. Plaintiff's January 5, 2024 motion to compel (ECF No. 139) is granted in part and
22 denied in part;

23 3. Within fourteen days defendants shall produce all non-privileged, pre-suit investigative
24 documents from a random sampling of 70 NOVs defendants have initiated;

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1 4. Within fourteen days defendants shall designate a witness in response to plaintiff's
2 deposition Topic No. 5; and

3 5. Plaintiff's motions are denied in all other respects.⁵

4 DATED: February 13, 2024

/s/ DEBORAH BARNES

5 UNITED STATES MAGISTRATE JUDGE

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25 ⁵ The undersigned has previously heard discovery disputes in this action. And many more are
26 already noticed for hearing. The parties are cautioned that “[t]he discovery process in theory
27 should be cooperative and largely unsupervised by the district court.” Sali v. Corona Regional
28 Medical Center, 884 F.3d 1218, 1219 (9th Cir. 2018). “When that cooperation breaks down, the
district court has broad discretion to regulate discovery conduct and, if needed, impose a wide
array of sanctions.” Infanzon v. Allstate Insurance Company, 335 F.R.D. 305, 311 (C.D. Cal.
2020). In the future, a party that presents an unmeritorious discovery motion should be prepared
for an award of monetary sanctions.